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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 753

ALEXANDER BIRNS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

ALEXANDER BIRNS,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The petitioner, Alexander Birns, asks that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on June 28, 1967 (Appendix 42a-43a) denying petitioner's motions for appeal of right and for leave to appeal. A motion for reconsideration was denied on July 26, 1967 (Appendix 43a). The consequence of the denial of these motions (two cases)*

* The Court of Appeals for Cuyahoga County, Ohio and the Supreme Court of Ohio treated the petitioner's assignments of error under two appellate case numbers—27812 and 28002 in the Court of Appeals; and 41013 and 41014 in the Supreme Court of Ohio. Both appeals stemmed from the trial in Common Pleas Case No. 81317 and are integral parts of that case. The two appellate cases and numbers are explained by the fact that a new case number was given petitioner's appeal from an order denying a motion for new trial on the basis of newly discovered evidence. In the Ohio practice this occasions a second appellate number and the ostensible bifurcation continues in the Supreme Court of Ohio although the cases are handled together at both Appellate levels.

Whenever reference is made in this petition to the record in the trial court it will be preceded by the prefix "R." When the record on the Motion for a new trial on the basis of newly discovered evidence is involved the prefix will be "NTR."

was the affirmance of the Ohio Court of Appeals (two cases) which had sustained the conviction of this petitioner who had been found guilty by a jury and sentenced in the Court of Common Pleas for Cuyahoga County, Ohio.

OPINIONS IN THE COURTS BELOW.

The Court of Common Pleas for Cuyahoga County, Ohio—the trial court—rendered no opinion.

The opinion of the Court of Appeals for the Eighth District of Ohio is officially reported in 10 Ohio App. 2d 103, 226 N. E. 2d 149 (1967) and is reprinted in Appendix 27a.

The Supreme Court of Ohio did not write an opinion. The entries denying petitioner's motions for appeal of right, for leave to appeal and for reconsideration are reproduced in Appendix 42a-43a.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on July 26, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). Petitioner claims his conviction was acquired in violation of rights, privileges and immunities secured by the Constitution of the United States.

QUESTIONS PRESENTED.

I.

Whether evidence acquired in violation of the Fourth Amendment, and suppressed in a prior case against the petitioner, can be introduced in the present case without violating the Fourth Amendment, the notice clause of the Sixth Amendment and, finally, the Due Process clause of the Fourteenth on the ground that the use of such evidence convicts, or tends to convict, on a charge not laid.

II.

Whether the State violated the petitioner's right to Due Process of Law when it put a policeman on the witness stand to testify that he had heard an alleged bribe offer transmitted by radio while suppressing the fact that the automobile in which the policeman-witness was stationed to listen to the broadcast was involved in a collision with another car requiring the witness' absence from the vicinity of the radio receiver during an interval which was in the time period covering the crucial conversation.

III.

Whether deliberate and persistent questioning on unrelated issues to force the petitioner to invoke the privilege against self-incrimination in the presence of the jury violated his right of confrontation and right against self-incrimination contrary to the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment.

IV.

Whether petitioner's right to Due Process of Law was violated by the timing and quantity of publicity given his federal indictment for perjury—which coincided with final summation in the present case where the crucial issue was the weighing of petitioner's credibility against that of policemen.

V.

Whether the petitioner's right to Due Process of Law was violated by the T ial Court's failure to apply the "beyond a reasonable doubt" test to determine the effects of an error of constitutional dimension.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to * * * trial, by an impartial jury * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defense."

Amendment XIV:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

Ohio Statutes.

The relevant portions of the pertinent Ohio Statutes involved are:

R. C. 2917.01:

"No person shall corruptly give * * * to a state, * * * or other officer any valuable thing, * * * to influence him with respect to his official duty."

R. C. 2917.07:

"No person shall, corruptly * * * attempt to influence a * * * witness, * * * or corruptly * * * obstruct or impede, or attempt to obstruct or impede, the due administration of justice therein."

STATEMENT OF THE CASE.

On July 23, 1964, the Defendant in this case and one Keeling were arrested at 5715 Brookpark Road in Parma, Ohio. An indictment for promoting a numbers game stemmed from the arrest (R. 671), hereafter called the first case. The indictment came down in the first case on July 28, 1964 (R. 669) and it (C.P. No. 80677) was still pending on November 23, 1954 (R. 669), the day of the events relevant to the present case, hereafter referred to as the second case. A motion to suppress the evidence in the first case on the ground of illegal acquisition was granted on October 26, 1965, *State v. Birns and Keeling*, C.P. No. 80677.* The present trial (i.e. in the second case) did not begin until December 7, 1965 (Tr. 2; Appendix 3a.)

The trial in the second case resulted in Defendant's conviction on two counts. These, in the vernacular, were bribery and witness tampering (Appendix 1a-2a). The convictions rested on an allegedly incriminating conversation and exchange of money between Defendant and a Parma Detective, Clarence Bennett, at the Beef and Bottle Restaurant in Parma, Ohio. (R. 106-107, 153, 191, 193, 621-622, 705-708, 1247.) Corroboration was claimed by another Parma law officer, one Frank Eschweiler, who

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* The ruling on that motion in the first case stood and still stands undisturbed. The State's motion for reconsideration (R. 671) was denied on January 31, 1966, *State v. Birns and Keeling, ibid.*

said he monitored the crucial conversation by radio.* The transmission was accomplished, it is claimed, by way of a transmitter concealed on the person of Detective Bennett and recorded through an open microphone on a tape recorder. (R. 84-88, 156-157, 165, 169-171.)

Early in the trial of the second case the State began to refer to various aspects of the first case including the evidence which had been suppressed.**

The ploy began with a view of premises involved in the first case (R. 20-23, 26, Appendix 3a-5a), continued in opening statement and was maintained, unabated, through final argument where part or all of 12 pages of transcript were used to dilate upon the first case. (R. 892-895, 971-972, 975-978, 987, 989, 990.) During the taking of evidence, the Court allowed extensive testimony about the nature of the numbers racket and the defendant's alleged relationship to it (R. 623-641; Appendix 8a-12a), including descriptions relating to physical items suppressed in the first case, *State v. Keeling, et al.*, C. P. No. 80677 (R. 639; Appendix 11a-12a), growing out of the raid and illegal seizure on July 23, 1964. This was done over the defendant's objections and motions for mistrial. (R. 624-629, 631, 634, 635, 638, 640, 876, 878-879; See Appendix 8a-10a, 10a-12a, 18a-19a.)

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* Eschweiler conceded considerable interference (R. 284), including police calls on the same receiver (R. 254), and admitted "editing" the parts he thought unimportant (R. 254) by turning the recorder on and off (R. 245, 254, 283, 288-290). See pp. 8-9, *infra*, for a discussion of yet another interference—a collision between the monitoring car and another automobile.

** The defense objected early, vigorously and permanently to any reference to the gambling charge beyond the introduction of the indictment (R. 23, 26-30, 38-40, 624-629, 634-635, 876-879.) (Appendix 4a, 5a-6a, 6a-7a, 8a-10a, 11a, 18a-19a.) The objection was renewed on motion for a new trial. (Appendix 24a-25a; R. 1049 et seq. 1211-1214, 1223.) The point was saved on appeal. (Appendix 25a-26a.)

In addition to permitting testimony related to suppressed materials and to an accusation not laid in the indictment in the second case, the trial court assisted the prosecution effort by permitting the jury to view the premises at 5715 Brookpark Road, the scene of the arrest in the first case, over defense objection (R. 23, 26-27, 29-30; Appendix 4a, 5a, 6a); the view also included (properly) the areas in the Beef and Bottle Restaurant, the scene of the crucial events in the case on trial (the second case). The order allowing "the view" referred *only* to "the place" (Tr. 2). To this *only* the defense agreed (R. 22; Appendix 4a). The defense did not anticipate and was not told of the Brookpark site view until just before it was proposed. The defense promptly objected by telephone and in the record on the return to court. (R. 23, 26-27, 29-30; Appendix 4a, 5a, 6a.) The objection was overruled. (R. 27; Appendix 5a.)

Detective Eschweiler was a key witness in the second case against the defendant. His testimony and related matters covered approximately one hundred and twenty-nine pages. (R. 239-322, 478-524.) The evidence he gave corroborated that of the other principal state witness, Detective Clarence Bennett. Bennett told of an allegedly incriminating conversation between Birns and him while at dinner at the Beef & Bottle Restaurant in Parma. Eschweiler testified that he clearly heard the conversation between the Defendant and Bennett over a radio receiver in his private car parked near the restaurant. (R. 244-249, 262.) This was so, Eschweiler said, even though the tape he was making with an open microphone and recorder in his automobile came out too garbled on the tape for much to be audible.* On trial he (Eschweiler) said:

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* See R. 476 for a distinguishable passage verifying the defendant's version of the colloquy (R. 476). This case illustrates

"I had the tape recorder on and off *throughout the duration of the conversation.*" (R. 245.) (Emphasis supplied.) (Cf. NT R. 53-54.)

A defense objection on the ground that the answer was not responsive resulted in the striking of the quoted material. (R. 245.)* Regardless of this strike, other and further testimony by Detective Eschweiler clearly implied constant auditory surveillance of the conversation. (See R. 244-245; 254; 289-290; 492; 510; Cf. NTR 59-60; 62-64; 70-71.)

Eschweiler also testified at the trial that he had told:

"Everything of relevance to this case, yes, I have.
Q. Everything?
A. Yes, sir.
Q. There is nothing more?
A. Not that I can recall." (R. 290.)

Nowhere does the Eschweiler testimony mention that his car was struck by another, nor that his vehicle was damaged, that he was out of his automobile at all during the crucial interval or that any other police officer was on the scene outside the restaurant during the monitoring (see R. 239-332, 478-524). Eschweiler concedes this (NT R. 50-51). Nor was information in his and Bennett's combined reports (State Ex. 9 and 10—received as Def's NT Ex. 6 and 7, NT R. 184) even though the second combined

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(Continued from preceding page)

one of the vices of electronic surveillance. If the tape is clear and incriminating, it is used against the accused. If it is not clear, or exculpatory material is wiped out by tampering, then the auditor's oral corroboration is available. The State has it either way where the recording is not made with a jack and cord directly connecting the receiver and the tape recorder. Although Defendant Birns demanded and received access to the tape when he learned of the recording (R. 127-128, 711), its garbled condition availed him nothing.

* But it retains status as a statement contradicting later testimony during the hearing on the motion for new trial.

report was *made* because the first was insufficiently detailed. Eschweiler testified at the trial on the merits that the first report (State Ex. 9, Def's NT Ex. 6) was a statement "regarding all the events" of the incident (R. 485, 487-492; NT R. 64-67, 70-71; cf. NT R. 83-84) but State Ex. 10 (Def's NT Ex. 7) was "more detailed." (R. 492.) That his car was struck by another during the monitoring interval was confirmed by three witnesses and their affidavits supported and corroborated in part by a police report* from the Parma Police Department [Def's Ex. B, C, D and E(1) and (2) attached to motion for new trial on newly discovered evidence] describing a collision on the evening of November 23, 1964, between a parked vehicle owned by Frank W. Eschweiler and an automobile driven by Donald E. Hale, one of the witnesses.

Both Detective Bennett and Detective Eschweiler testified that the collision information was conveyed to the prosecutors in charge of the case. (NT R. 51-52, 82, 190.) No one claims that disclosure to the defense was made on trial (cf. NT R. 50-51; see also entire transcript of trial testimony).

This point on the suppression of the collision information was saved by a motion for new trial based on newly discovered evidence (Appendix 26a) and on appeal. (Appendix 57a.)

It became apparent during the trial that defendant would be compelled to assert the privilege against self-incrimination if the prosecution persisted in questions concerning the defendant's income. The prosecution was so advised side bar in the presence of the court and out of the presence of the jury. Such action was necessary because a federal grand jury was then engaged in an in-

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* Acquired after the affiants first made the fact of the collision known to the defendant.

vestigation of the defendant's income. (R. 719-727, Appendix 12a-15a.) Nevertheless, the prosecution asked the questions over and over again. The court refused to interfere although requested to do so. (R. 719, 725-726-727, 727-732, 799, 803-804, 814, 884; Appendix 12a, 14a-15a, 15a-17a, 17a, 19a-20a.)

The Defendant Birns and his difficulties with the law were given extensive attention in all the news media before and during his trial on the charges in the instant case. [See Def's Exhibits (Motion for New Trial) 1 A-R; 2 A-JJJ; 3 A-R; 4; 5; 6 A-S; 7 A-11; and 8 A-DD.] The jury was not sequestered during this interval and was repeatedly given faulty admonitions. (Cf. R. 11-12, 198, 237-238, cf. R. 382, 495, 524, 571, 727, 840; Appendix 7a-8a, 8a, 18a.)

The cap was put upon the publicity when, after argument had begun in the present case (See R. 888), the media announced Birns' federal indictment on December 21, 1965, on charges of perjury in connection with his income tax. The Cleveland Press, perhaps the worst but certainly not the only offender, carried a banner headline on that day (see Def's Ex. 6-T, Motion for New Trial):

"U. S. GRAND JURY INDICTS SHONDER BIRNS"

A two-column head proclaimed:

"Perjury is charged by U. S. on Shonder Birns' Income Tax"

After this soak of publicity in the midst of argument, the jury got the case on December 23, 1965, and returned the verdict of guilty.

In ruling on the constitutional questions, the Trial Court either overruled them without a delineation of reason (R. 1186, Appendix 21a; R. 1237, Appendix 23a) or applied the reasonable probability "of a different result" test. (NTR 585; Appendix 23a-24a.)

REASONS FOR ALLOWING THE WRIT.

I.

Whether evidence acquired in violation of the Fourth Amendment, and suppressed in a prior case against the petitioner, can be introduced in the present case without violating the Fourth Amendment, the notice clause of the Sixth Amendment and, finally, the Due Process clause of the Fourteenth on the ground that the use of such evidence convicts, or tends to convict, on a charge not laid.

Since *Mapp v. Ohio*, 367 U. S. 643 (1961), it has been settled constitutional principle that evidence acquired in violation of the Fourth Amendment is amenable to a timely motion to suppress in state trials. The rule is not that the product of an illegal search should not be used in a particular way "but that it should not be used at all." *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920). Any derivative of the illegal search is proscribed, *Wong Sun v. United States*, 371 U. S. 471, 486-487, 487-488 (1963). And federal standards for the application of Fourth Amendment rights set the minimal requirements for the states, *Ker v. California*, 374 U. S. 23 (1963).

To be sure the use at issue here is in a setting different from any Petitioner's research has discovered. That is, evidence suppressed in the first case was admitted over objection in the second case. However, if the evidence in the first case can be transported to, and used, in the second case, the policy determined by the constitutional standards of *Mapp v. Ohio, supra,* is defeated. To prevent a flagrant circumvention of that policy and define the limits of the exclusionary rule, the writ should issue here.

The Sixth Amendment requires that a defendant "be informed of the nature and cause of the accusation." In-

ferentially, at least, this right has been held basic to Due Process and therefore applicable to state proceedings, cf. *DeJonge v. Oregon*, 299 U. S. 353 (1937) and *Cole v. Arkansas*, 333 U. S. 196 (1948). Petitioner could not have notice of a charge not laid. Nor is procedural Due Process compatible with conviction on the unlisted charge.

The specific proposition is that the use of evidence suppressed in one trial to make the proof in a second convicts or tends to convict on a charge not laid. Whether this violates the Sixth Amendment notice clause has not been passed on by this Court in a State case.

II.

Whether the State violated the petitioner's right to Due Process of Law when it put a policeman on the witness stand to testify that he had heard an alleged bribe offer transmitted by radio while suppressing the fact that the automobile in which the policeman-witness was stationed to listen to the broadcast was involved in a collision with another car requiring the witness' absence from the vicinity of the radio receiver during an interval which was in the time period covering the crucial conversation.

Credibility judgments were crucial in this case. Fundamentally, the jury was called upon to determine whether the petitioner or two policemen were telling the truth. It follows that matters reflecting on the police credibility were crucial to decision and affected substantial rights of the petitioner. Nonetheless, suppression kept these matters from the jury. *Napue v. Illinois*, 360 U. S. 264, 269-270 (1959) has established that the use of false evidence affecting credibility denied Due Process:

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *."

No case has been found in which this Court has had the occasion to decide that the *suppression* of evidence going only to credibility denied Due Process, but the implications of *Napue* reach the point. And the United States Court of Appeals for the District of Columbia has required a new trial for non-disclosure of evidence which had a bearing on the witness' credibility. *Levin v. Katzenbach*, 34 L. W. 2652 (5/19/66). The granting of the writ will provide an opportunity to clarify this issue.

In the present case, the police testified that the prosecution had knowledge of the collision before the trial began (NTR 51-52; 90). The assistant prosecutor argues that he would not say whether "we" had such knowledge or not but "* * * whether or not we had knowledge that there was a collision isn't important * * *" (NTR 583).

This case provides the occasion for this Court to firmly declare whether or not the federally guaranteed right to a fair trial in state tribunals allows state suppression of evidence vitally affecting the credibility of state witnesses. The facts here pose the obverse side of the principle in *Fahy v. Connecticut*, 375 U. S. 85 (1963).* Granting certiorari will allow the Court to determine whether the suppression of relevant evidence going to credibility which might have influenced the jury and can be treated as harmless error. Cf. *Chapman v. California* (S. Ct. of U. S. 2/20/67), 35 L. W. 4197, 4199.

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* That is, it was prejudicial to admit illegally seized evidence which corroborated police testimony. Here, illegally suppressed evidence would have reflected adversely on police credibility.

III.

Whether deliberate and persistent questioning on unrelated issues to force the petitioner to invoke the privilege against self-incrimination in the presence of the jury violated his right of confrontation and right against self-incrimination contrary to the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment.

It is settled constitutional principle that the right to confrontation is inherent in Due Process, *Pointer v. Texas*, 380 U. S. 400, 403 (1965); *Douglas v. Alabama*, 380 U. S. 415, 419 (1965). In *Douglas*, a convicted, separately tried "Co-defendant" was put on the stand and forced repeatedly into invocations of the privilege against self-incrimination in connection with a confession of his own which considerably damned the defendant on trial. The relevant principle of the *Douglas* case is:

> "The alleged statements clearly bore on a fundamental part of the State's case against the petitioner. The circumstances are therefor such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " (Citing cases.)

This Court has not had occasion to apply the *Douglas* rule to a fact pattern in which the defendant is forced, as in this case, to invoke the privilege with respect to matters irrelevant to the issues on trial although it has said that cross-examination on a matter not in issue is not harmless error. *Pierson v. Ray*, 85 S. Ct. 1213 (1967).

But in *United States v. Maloney*, 262 F. 2d 535, 537-538 (Cir. 2, 1959), the prosecution called witnesses it knew would assert the privilege. The conviction was re-

versed. At page 537 the United States Court of Appeals stated the controlling principle:

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind."

See also *United States v. Compton* (Cir. 6, 8/4/66), 35 L. W. 2114 (unfair trial tactic if it appears counsel calls witness merely to force him to claim privilege).

The grant of the writ here would provide the occasion for delineating the application of the *Douglas* rule.

To allow the state to force invocation of the privilege on an unrelated issue will also circumvent the principle established in *Griffin v. California*, 380 U. S. 609, 613 (1965) proscribing prosecution comment on a defendant's failure to testify. There is no material difference in commenting on the accused's failure to take the stand and forcing the invocation on a question not in issue. Thus, by indirection the underlying policy of the *Griffin* case is frustrated, i.e., to prevent the "tendering to the jury for its consideration—the failure of the accused to testify." Furthermore, if it becomes established law that this prosecution tactic is consonant with due process, the effect will be to chill the accused willingness and desire to testify in his own behalf.

IV.

Whether petitioner's right to Due Process of law was violated by the timing and quantity of publicity given his federal indictment for perjury—which coincided with final summation in the present case—where the crucial issue was the weighing of petitioner's credibility against that of policemen.

The impact of a line of recent cases, e.g., *Rideau v. Louisiana,* 373 U. S. 723 (1963); *Estes v. Texas,* 381 U. S. 532 (1965); *Sheppard v. Maxwell,* 384 U. S. 333 (1966), supports the conclusion that fair trial requires that a conviction be free from the extraneous influences exercised by sources outside the courtroom, e.g., excess newspaper or television coverage. Here the petitioner seeks to add dimension to the principle—he claims that the timing of the publicity, as well as its volume, and its source, the federal government, give additional constitutional stature to his contention that publicity prevented his receiving a fair trial.

V.

Whether the petitioner's right to Due Process of law was violated by the Trial Court's failure to apply the "beyond a reasonable doubt" test to determine the effects of an error of constitutional dimension.

The trial court's test, sustained by the Court of Appeals, for the effect of constitutional error was that "the facts as it found them to be if presented to the jury would not within reasonable probability cause the jury to come to a different result." [See *State v. Birns,* 10 Ohio App. 2d 103, 226 N. E. 2d 149, 154 (1967), cf. Appendix 35a.)*] This test contravenes the standard

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*The Supreme Court of Ohio simply denied appeal of right and leave to appeal although the issue was raised. See excerpt from Memorandum in support of jurisdiction in Su-

for harmless error set by this Court in *Chapman v. California,* 35 L. W. 4197 (S. Ct. of U. S. 2/20/67) at p. 4199:

> "* * * we hold * * * that before a federal constitutional error can be held harmless, the court must declare a belief that it was harmless beyond a reasonable doubt." *

CONCLUSION.

This Court has established rules marking the minimum standards for due process in the administration of criminal justice. And, in connection with the application of statutory standards, the Court has indicated that it would intervene "when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. N.L.R.B.,* 340 U. S. 474, 491 (1951). How much more appropriate that the Court intervene when a state misapprehends or grossly misapplies Constitutional standards. In five particulars the State of Ohio has ignored, misapprehended or grossly misapplied such standards in convicting the petitioner. The writ should issue to provide the Court an opportunity to examine the State of Ohio's stewardship of federal constitutional standards, to reaffirm existing standards, to buttress them by explaining and demonstrating new applications to prevent circumvention and, incidentally, to prevent petitioner's conviction in a trial conducted under conditions that flout Due Process of law.

Respectfully submitted,

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preme Court of Ohio, Appendix 40a-42a. See discussion of Opinions in the Courts below, *supra,* p. 2.

* That a constitutional point not available at time of trial may be raised later, see *Curtis Publishing Co. v. Butts,* 35 L. W. 4636, 4639 [text and fn. 5] (U. S. S. Ct. 6/12/67).